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Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Application by SBC et al for Provision of In-Region InterLATA Service in Missouri
CC Docket No. 01-88

Dear Ms. Salas:

Enclosed for filing please find the Reply Comments of AT&T Corp. ("AT&T") in connection with the above referenced matter. Pursuant to the Public Notice issued April 4, 2001, AT&T is submitting the original and four (4) copies of its comments and supporting exhibits in redacted form.

AT&T is also submitting under seal the portions of supporting exhibits that contain material designated as confidential pursuant to the Protective Order in this matter. These pages bear a legend indicating that they are confidential.

Please let me know if any additional information is required. Thank you.

Very truly yours,

Peter M Andros

Peter M. Andros
Legal Assistant

Encl.

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ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Application by SWBT Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a/ Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Missouri	)))))))))	CC Docket No. 01-88

REPLY COMMENTS OF AT&T CORP.
IN OPPOSITION TO SBC COMMUNICATIONS, INC.'S
SECTION 271 APPLICATION FOR MISSOURI

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May 16, 2001

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Massachusetts 271 Order	Memorandum Opinion and Order, *Application of Verizon New England Inc. (d/b/a Verizon Long Distance) et al For Authorization to Provide In-Region InterLATA Services in Massachusetts*, CC Dkt. No. 01-9 (rel. April 16, 2001)
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MISCELLANEOUS PLEADINGS CITED

DOJ Eval.	Evaluation of the United States Department of Justice, *Application by SBC Communications, Inc., et al, for Provision of In-Region InterLATA Services in Missouri*, CC Dkt. No. 01-88 (May 9, 2001)
Staff Report	Final Arbitration Order, *AT&T Communications of the Southwest, Inc.'s Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company*, Case No. TO-97-40, *Petition of MCI Telecommunications Corporation and its Affiliates, including MCImetro Access Transmission Services, Inc. for Arbitration and Mediation Under the Federal Telecommunications Act of 1996 of Unresolved Interconnection Issues with Southwestern Bell Telephone Company*, Case No. TO-97-67, Attachment C, Cost and Pricing Report (July 31, 1997)

APPENDIX TO COMMENTS OF AT&T CORP. IN OPPOSITION TO SBC's SECTION 271 APPLICATION FOR MISSOURI

CC Docket No. 01-88

EX.	DECLARANT	SUBJECT(S) COVERED
F	Micahel R. Baranowski	SWBT's failure to provide data or documentation supporting its cost studies, and SWBT's cost studies violate TELRIC.
G	Wauneta Browne	Description of SWBT's Oklahoma UNE rates.
H	Michael Lieberman	Description of errors in SWBT's May 4 *ex parte* Letter and corrections addressing those errors.
I	Walter W. Willard	SWBT's failure to provide nondiscriminatory access to maintenance and repair functions, including the failure of SWBT to correct (even on a prospective basis) systems problems that prevent CLECs from opening a substantial number of trouble tickets on SWBT's electronic maintenance and repair interfaces.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Application by SWBT Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a/ Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Missouri	)	CC Docket No. 01-88

REPLY COMMENTS OF AT&T CORP.
IN OPPOSITION TO SBC COMMUNICATIONS, INC.'S
<u>SECTION 271 APPLICATION FOR MISSOURI</u>

Pursuant to the Commission's Public Notice, AT&T Corp. ("AT&T") respectfully submits these reply comments in opposition to the application of SBC Communications Inc. ("SWBT") for in-region, interLATA authority in Missouri.

INTRODUCTION AND SUMMARY OF ARGUMENT

The comments fully confirm that SWBT's Section 271 application for Missouri should not be granted. The comments demonstrate, in particular, both that there is no significant residential competition in Missouri, and that the lack of competition is attributable to SWBT's failure to meet numerous checklist obligations as well as to the persistence of significant entry barriers and to SWBT's anticompetitive conduct. The comments, in short, confirm that SWBT's monopoly control over the local residential market in Missouri remains secure. To grant SWBT's application in such circumstances would profoundly damage consumer welfare. It would enable SWBT to maintain its local monopoly and extend it into the long distance market, quickly gain market share with its unique ability to offer one-stop shopping to residential customers, and then raise long distance prices. The comments thus amply demonstrate that the inevitable result of granting this application would be the remonopolization of telecommunications service, which section 271 is expressly designed to prevent.

The Evaluation of the Department of Justice ("DOJ") is particularly telling. The DOJ begins by summarizing the evidence concerning the lack of any meaningful local residential competition in Missouri. DOJ Eval. at 3-8. DOJ observes that resellers have captured only 2% of SWBT's residential lines, facilities-based carriers only 1% (with future service now in doubt), and UNE-P carriers virtually none at all. *Id.* at 4-6. As DOJ observes, the absence of significant residential competition "contrasts sharply" with the experience in New York and Texas at the time those applications were filed.

The DOJ further summarizes the overwhelming record, established by numerous commenters, that attributes the lack of any meaningful residential entry not to CLEC business plans that exclude Missouri, but to SWBT's failure to satisfy its statutory obligations. The comments show not only that SWBT has failed, in numerous ways, to fully implement the competitive checklist, but that SWBT also has failed to cooperate with competitors and created or exacerbated numerous entry barriers, all of which has served to keep the Missouri local markets closed to local competition.

Thus, Part I below describes how the comments demonstrate that SWBT has not yet established cost-based rates for unbundled network elements ("UNEs"). As DOJ observes, the record is replete with evidence that SWBT's UNE rates are outside the range that a reasonable application of TELRIC would produce. Indeed, the evidence of non-TELRIC rate-setting on "key questions of method and inputs" is so pronounced and compelling that the Department now "urge[s] the Commission to undertake an independent scrutiny of the prices at issue rather than rely on the Missouri Public Service Commission's ("PSC") price-setting decisions." DOJ Eval. at 2.

The comments further confirm that any such independent review of SWBT's Missouri prices will reveal that they lie outside the range that a reasonable application of TELRIC principles would produce. The comments demonstrate, for example, that Missouri UNE rates are substantially higher than those in the neighboring SWBT states, and that the price differences are not explained by differences in costs. Instead, the comments resoundingly support a different explanation – that Missouri's UNE rates are the product of TELRIC violations with respect to a far greater number of crucial factors – including depreciation, switch discounts, fill factors, common costs, Digital Loop Carrier ("DLC"), and structure sharing – than have affected any prior federal Section 271 application.

The record with respect to SWBT's TELRIC violations is, if anything, vastly understated, because SWBT has failed to provide commenters and this Commission with even the most basic supporting cost evidence, documentation, and explanation for its rates. *E.g.*, DOJ Eval. at 14 & n.47. The comments also highlight yet a third fundamental deficiency in SWBT's UNE rates. While other applications have come to this Commission with some limited and focused reliance on interim UNE rates, this application is unprecedented in its extraordinary reliance "on a large number of rates that have remained interim for a long time." DOJ Eval. at 19. Indeed, nearly half of the Missouri UNE rates are interim. McLeodUSA at 31; Sprint at 4-8. And as DOJ notes, these rates "are troublingly high and have been left as interim for years, despite concerns" that they are "not forward-looking." DOJ Eval. at 19. The comments thus leave no doubt that local entry in Missouri has been impeded by above-cost rates.

As set forth in Parts II and III, the comments also underscore the importance of other checklist violations. In particular, DOJ has urged the Commission to investigate AT&T's contention that SWBT is violating its resale obligations with respect to advanced services by offering DSL services to end users without making those services available to CLECs at a wholesale discount. SWBT's belated attempt (after the filing of AT&T's comments) to address the problem by removing one offending statement from its Missouri website is unavailing. It not only flatly violates the complete-when-filed rule, but is disingenuous – other statements on its web-site, plus the representations of at least one of its official "ISP Partners" on its linked web-page, confirm that SWBT continues to offer and bill for a separate DSL transport service.

DOJ has also asked the Commission to give "careful attention" to the evidence of SWBT's failure to provide CLECs with non-discriminatory access to its repair and maintenance systems. SWBT's discriminatory conduct in this area is stark – it requires CLECs to report troubles manually for a significant percentage of customers whose service was established prior to a SWBT upgrade in late March, 2001. Such manual reporting creates substantial delays in the repair of a CLEC customer's line – an obviously significant competitive disadvantage. Moreover, it is now clear that the March upgrade, which SWBT claimed would fix the problem prospectively for new customers, is itself an unqualified failure. Both AT&T and Birch Telecom have experienced error rates in excess of 40 percent with respect to orders provisioned after the upgrade. Thus, SWBT continues to subject both old and new CLEC customers to discriminatory manual reporting of troubles and substantial delays in the repair of troubled lines.

As shown in Part IV, the comments also confirm that approval of SWBT's Missouri application is not in the public interest. As DOJ's Evaluation and the comments attest, SWBT has not yet opened its local markets to competition. Resale and facilities-based competition for residential customers is negligible, and UNE-based competition is virtually nonexistent. The comments demonstrate that the lack of any meaningful residential competition in Missouri is a result of the very factors that this Commission has previously and correctly held to be crucial to the assessment of the public interest – setting UNE prices at a level that precludes efficient entry; creating undue uncertainty as to the availability of crucial inputs such as permanent cost-based rates; failing to implement reliable and effective performance monitoring and enforcement; and engaging in discriminatory and anticompetitive conduct.

To approve SWBT's application in the face of this evidence would conflict with the fundamental premise of section 271 – that BOCs should be precluded from offering long distance service unless and until they first demonstrate that their local markets are fully and irreversibly open to competition. That showing has not been and cannot yet be made in Missouri. SWBT's application for interLATA authorization in Missouri is, in reality, a request for a license to leverage its longstanding and still unassailable monopoly over local residential service into the long-distance market. As the report of the Texas PUC confirms, granting SWBT alone the unique ability to offer consumers a package of local and long distance service will only enable SWBT rapidly to gain long distance market share while raising long distance prices. Such monopolistic conduct, which has already occurred in Texas, would be all the more swift and devastating in Missouri, where local residential competition has not yet even begun.

Finally, there is growing public recognition that BOCs in general, and SWBT in particular, appear quite willing to pay the small financial price of sanctions for violating or ignoring their market-opening duties under the Act, in exchange for the greater rewards (to them) of remonopolization. SWBTs affidavit misconduct in the Kansas/Oklahoma proceeding underscores this, and shows that SWBT will say – but not do – anything to secure Section 271 authority before it is warranted. SWBT plainly views Missouri as the next step in this process, but it should instead be the Commission's opportunity to put a stop to such conduct.

I. SWBT'S UNE RATES FOR MISSOURI VIOLATE CHECKLIST ITEM TWO.

As DOJ observes, "competitive entry using UNEs to reach residential customers is almost non-existent [in Missouri], suggesting that entry may have been impeded by above-cost rates." DOJ Eval. at 2. The anemic (indeed, generally negative) "margins" available to potential competitors at SWBT's approved UNE rates likewise strongly suggest that SWBT's Missouri UNE rates are not cost-based. *See* AT&T at 61 & n.62; Baranowski Decl. ¶¶ 10-46. And the DOJ Evaluation and other comments confirm that SWBT's UNE rates fall far "outside the range that the reasonable application of TELRIC would produce." DOJ Eval. at 2.

The expert analyses submitted by several commenters demonstrate that SWBT's Missouri UNE rates are significantly higher than those in neighboring states and that this disparity is not explained by cost differences between those states. DOJ Eval at 2.[1] The disparity between SWBT's Kansas recurring rates, which were the product of a rigorous application of TELRIC principles, and its Missouri recurring rates, which were not, is stark: although the costs of providing UNEs in those two adjoining states are concededly about the same, SWBT charges 25-50 percent more for the same elements in Missouri. SWBT has

[1] *See also* WorldCom at 2-3 (noting that price disparities are not explained and that supporting cost studies have not been provided by SWBT); Sprint at 9 (SWBT does not "explain the magnitude of the differences between SWBT's rates in Missouri as compared to [] other states").

provided *no* evidence to support this large price/cost disparity and thus plainly has not carried its burden of proving that it has established cost-based rates in Missouri. For this reason alone, the Application should be denied. At the very least, however, large disparities between prices and costs in Missouri and neighboring states means that the Commission must "undertake an independent scrutiny of the prices at issue rather than rely on the Missouri [PSC's] price-setting decisions." DOJ Eval. at 2; *see* 47 U.S.C. § 271(d)(3) (requiring an independent Commission "determination" of checklist compliance).[2]

Any such review confirms that SWBT's cost studies – as adopted by the Missouri PSC – violate numerous fundamental TELRIC principles. *See* DOJ at 2.[3] As DOJ notes, it is not enough that a state Commission has "endorsed forward-looking cost principles"; the critical question is whether the state commission has "properly selected forward-looking methodologies and inputs." DOJ Eval. at 9. It is clear that the Missouri PSC has not done so. The DOJ Evaluation catalogues many of the ways in which the UNE rates in Missouri have been substantially inflated by the use of inputs and methodologies that flatly violate forward-looking cost principles and the Commission's TELRIC rules. *See* DOJ at 14.[4] These serious TELRIC

[2] *See also* DOJ Eval. at 8-10 (citing *New York 271 Order* ¶ 244); WorldCom at 4 (Commission "has the exclusive responsibility for determining checklist compliance) (citing *Michigan 271 Order* ¶ 282); Sprint at 3 ("The Act vests in the Commission *exclusive responsibility* for determining whether a BOC has priced" UNEs "in accordance with the pricing requirements set forth in section 252(d) and, therefore, whether the BOC has fully implemented the competitive checklist.") (quoting *Michigan Order* ¶ 282).

[3] *See also* DOJ Eval. at 14-19 (summarizing various "errors affecting the [PSC-adopted] rates"); WorldCom at 6-12 (detailing violations of TELRIC principles in SWBT's development of switch and loop rates).

[4] *See also* WorldCom at 6-12 (detailing errors and inconsistencies in inputs used to calculate loop and switching rates).

violations are detailed in expert analyses submitted by a number of commenters, and they foreclose any finding that SWBT's Missouri UNE rates comply with Checklist Item Two.

At the outset, SWBT's cost studies violate even the Commission's most basic rule against computing UNE costs using a network "reproduction" approach rather than a "replacement" approach. AT&T at 13-15. Beyond that, virtually every critical input and methodological choice underlying the PSC-approved rates violates core forward-looking cost estimation principles. In this regard, it is important to recognize that although prior BOC applications have reflected clear errors with respect to *some subset* of the depreciation, switch discount, fill factor, common cost, DLC, and structure sharing factors that generally drive UNE cost estimates, SWBT's Missouri rates reflect clear errors with respect to *all* of those factors. Moreover, the errors identified by the DOJ and other commenters are likely just the tip of the iceberg. SWBT has gone out of its way to obstruct the ability of regulators and other interested parties to identify and quantify the impact of its TELRIC violations by refusing "to make electronic versions of its cost models available for review and rerunning." DOJ Eval. at 14 n.47. The few cost models and input data that SWBT has finally disclosed in response to WorldCom's request (on behalf of itself and other interested parties) create more questions than they provide answers. That still incomplete material reveals processes that are riddled with errors and inconsistencies, *see* Baranowski Reply Decl. ¶ 8, which strongly suggest that there are even more extensive problems with SWBT's Missouri cost studies than those that already have been identified.

It bears repeating that it is SWBT's burden to prove checklist compliance, and, particularly in light of the enormous unexplained disparities between SWBT's Missouri rates and its rates in adjoining states and the resulting lack of UNE-based residential competition, SWBT's apparently strategic decision not to provide even the most basic supporting cost evidence, documentation, and explanation, precludes any rational finding that SWBT has demonstrated that its UNE rates are appropriately cost-based. The Commission not only should deny the application on this ground, it should make clear that full access to complete and documented electronic versions of supporting cost models – sufficient to allow the Commission and third parties to identify and quantify the impact of any deviations from TELRIC – will generally be required to establish BOC compliance with Checklist Item Two.

Finally, there is yet another independent reason why the Commission should rule that SWBT has failed to demonstrate compliance with Checklist Item Two. As DOJ and other commenters point out, SWBT's interim UNE rates (including both recurring and non-recurring charges) "exceed by a vast margin" the corresponding rates set in other SWBT states. DOJ Eval. at 12. What makes these "troublingly high" interim rates so different from the interim rates at issue in previous applications is, of course, that there are "so many" of them and that they have been "left as interim for years despite concerns having been raised that the rates were not forward-looking." *Id.* at 19.[5] Nearly *half* of the Missouri UNE rates upon which SWBT bases its application are interim rates. *See* McLeodUSA at 31; Sprint at 4-8. That is a far higher percentage than in any state in which Section 271 authority has been granted. Most of those interim rates were plucked from other states or from SWBT cost studies with no PSC review, and they have since been criticized by, among others, the PSC's own Staff. *See* DOJ Eval. at

[5] *See also* Sprint at 3 (Current rates "are not cost-based, and it is wholly uncertain when TELRIC rates will actual be established for UNEs in Missouri.").

19.[6] And the number of interim rates extends beyond the UNE rates – all of the collocation and advanced services rates are also interim.[7]

Moreover, the differences between the Missouri interim rates and those in Texas or Kansas, for example, "are as striking as those between the original 1998 Oklahoma" permanent rates that the Commission recognized could not be deemed TELRIC-compliant "and Texas or Kansas prices." DOJ Eval. at 12, n.40. The Commission has approved applications that included limited reliance on interim rates in narrow circumstances, *i.e.*, where the state commission has demonstrated its commitment to proper TELRIC pricing rules and where the interim rates are a reasonable solution to a specific and recent rate dispute. *See Kansas/Oklahoma Order* ¶ 238; *Massachusetts Order* ¶ 34. But the Missouri PSC's failure to replace SWBT's "troublingly high" interim rates with permanent, TELRIC-compliant rates, in the face of its own Staff's concerns about the non-TELRIC nature of the rates, and in the absence of any real use of UNEs for residential entry, precludes any finding that SWBT's UNE rates satisfy the Act's cost-based requirements.

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[6] *See also, e.g.,* Staff Report at 19 (MPSC Staff noting that "[i]t is important to remember that SWBT's assumption of a single feeder cable terminating to an FDI will overstate the cable costs and overstate the cost of the loop"); *id.* at 18 (recognizing that failure properly to allocate the costs of dark fiber "would raise some concerns since the unused fiber is dark fiber and the investment associated with dark fiber can be recovered separately").

[7] As noted in the DOJ Evaluation (at 19), "the Missouri PSC has yet to finalize rates for collocation as well as for certain other UNEs that had not previously been requested in Missouri." *See also* Sprint at 7 ("the Missouri PSC has opened a new docket to consider collocation pricing, adopting the Texas rates, terms and conditions as interim rates until permanent ones are established); WorldCom at 16 (noting that SWBT has "provide[d] insufficient detail on the terms and conditions of its [line-splitting] offering.").

A. SWBT'S UNE Rates Are The Product Of Many Clear TELRIC Errors And Fall Far Outside Any Reasonable TELRIC Range.

SWBT's UNE rates are "outside the range that the reasonable application of TELRIC principles would produce." DOJ Eval. at 2. As demonstrated by the expert analyses submitted by commenters[8] and by SWBT itself,[9] SWBT's UNE "[p]rices in Missouri are higher than those in neighboring states which the Commission has found to be compliant with TELRIC, and this disparity does not appear to be accounted for by cost differences between states." DOJ Eval. at 2.[10]

The most appropriate comparison state, for purposes of analyzing Missouri's UNE rates, is Kansas. See DOJ Eval. 12 & nn. 42, 43. This is true, in part, because (as DOJ observes) "these are adjacent states with nearly identical costs, according to the USF model." *Id.* But Kansas is the appropriate benchmark here for even more fundamental reasons. The Kansas Commission's application of TELRIC methodology in setting recurring UNE rates was, by all accounts, rigorous and independent. Its analysis was accepted as implementing TELRIC for recurring rates by all affected parties, even in a circumstance where its conceded failure to adhere to TELRIC principles with respect to non-recurring rates was roundly criticized. Indeed, SBC itself effectively endorsed the Kansas recurring UNE rates as TELRIC-based when it recommended that the Arkansas Commission borrow them for adoption in Arkansas. Texas, by contrast, is a much poorer benchmark. Widespread UNE-based residential competition has

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[8] *See, e.g.*, WorldCom at 4 & Frentrup Decl. at ¶¶ 7-11.

[9] *See* Letter from Geoffrey M. Klineberg to Magalie Roman Salas, Secretary, *Application by Southwestern Bell for Provision of In-Region, InterLATA Service in Missouri,* CC Docket No. 01-88 (May 4, 2001) ("May 4 *Ex Parte* Letter").

[10] *See also* WorldCom at 2-3 (noting that disparities are not explained and relevant cost studies have not been provided by SBC); Sprint at 9 (SBC does not "explain the magnitude of the differences between SWBT's rates in Missouri as compared to [] other states").

proven unsustainable at the rates set in Texas (and never reviewed by the Commission), despite extensive effort and investment by numerous CLECs to enter at those rates. That is strong evidence that the Texas rates in reality exceed TELRIC, and that those rates cannot reasonably be viewed as the TELRIC standard against which Section 271 applications for other states are measured. And to hold Oklahoma out as the TELRIC "standard" would truly make a mockery of the Commission's Section 271 authority, given the sheer arbitrariness of the process used to establish those rates and the reality that there is *no* significant UNE-based residential competition in Oklahoma.

When compared to UNE-rates in Kansas, Missouri's UNE rates are quite plainly excessive. As DOJ notes, "Missouri average loop rates exceed Kansas rates by 20 to 25 percent, and Missouri switch usage rates exceed those in Kansas by more than 50 percent." DOJ Eval. 13. Given that the USF model indicates that loop and switching costs are identical in Kansas and Missouri, these price differences are highly significant, entirely unexplained by SWBT, and, at a minimum, "compel[] further scrutiny of the Missouri rates." DOJ Eval. 13.

Comparisons to UNE rates and costs in other SWBT states further confirm that SWBT's Missouri rates cannot be cost-based. SWBT's Missouri loop rates, for example, exceed those in Oklahoma (by 8%), Texas (by 20%) and Arkansas (by 20%). *See* WorldCom at 4; Z-TEL at 5; AT&T at 12. However, the Commission's Synthesis Model estimates that it costs *less* to provide loops in Missouri than in Oklahoma or Arkansas, and that although Texas loop costs are somewhat lower than Missouri costs, that cost difference is not large enough to explain fully the substantial rate difference. *See id.* SWBT's Missouri switch usage rates likewise exceed rates in adjoining states notwithstanding that Missouri costs are generally lower. *See* DOJ Eval. at 10-12; WorldCom at 4; AT&T at 12.[11]

SWBT's non-recurring charges also "exceed by a vast margin" the NRCs set in other states. *See* DOJ Eval. at 11-12. Indeed, as the DOJ stresses, "Missouri NRCs exceed Texas, Kansas, and Oklahoma rates by two to thirteen times." DOJ Eval. at 12.[12] For instance, the DOJ evaluation points out that SWBT's own price comparison charts indicate that SWBT's Missouri NRC for analog line ports is $29.53 compared to only $1.27 in Texas (that charge is not applicable in Kansas). *See* DOJ Eval. at 12 n.43 (citing May 4, 2001 *Ex Parte* Letter). Similar examples of SWBT's excess NRCs in Missouri include the NRCs for dedicated transport for DS1 entrance facilities and cross-connects, as well as loop conditioning charges. *See* DOJ Eval. at 11-12 & nn.37, 40; McLeodUSA at 29.

Finally, recognizing the necessity of explaining the great disparities between its Missouri rates and its rates in adjoining states, SWBT recently submitted its own comparisons. But the May 4, 2001 *Ex Parte* Letter only confirms that SWBT's Missouri UNE rates are among the highest of any state in its five state region even though Missouri costs are among the lowest. *See* Lieberman Reply Decl. ¶ 1. SWBT's cost comparisons do, however, contain numerous errors that mute the magnitude of the rate/cost disparities. In particular, SWBT applied the

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[11] Other interested parties have identified even greater disparities after examining SWBT's Missouri UNE rates at a more granular level. Nuvox (at 3-4), for example, demonstrates that SWBT's recurring charges in Missouri for DS1 and DS3 entrance facilities are 200 to 600 percent higher than those in Texas, that SWBT's recurring charges for DS1 and DS3 Multiplexing are 200 percent higher than those in Texas, that SWBT's recurring charges for digital cross connect are 200 to 600 percent higher than those in Texas, and that SWBT's recurring charges for SS7 Link Cross Connects are about 75% higher than those in Texas.

[12] *See also* Sprint at 9 (chart demonstrating that certain Missouri NRCs are up to 225% higher than in Texas and Kansas).

wrong rates for Oklahoma – leaving out many of the last-minute discounts that the Commission found absolutely necessary to bring the Oklahoma rates within a "reasonable" TELRIC range [13] – and SWBT assumed a clearly erroneous port rate distribution for Texas. *See* Lieberman Reply Decl. ¶ 4. SWBT's UNE rate/cost comparison also reflects three additional fundamental errors that affect *all* of SWBT's UNE cost estimates: (1) SWBT erroneously assumed that tandem switching would not be used for access traffic in any state; (2) SWBT failed to account for Daily Usage Feed in the cost of the platform; and (3) SWBT failed to account for white pages delivery charges in the cost of the platform. *See* Lieberman Reply Decl. ¶ 2. When these general and state-specific errors are corrected SWBT's own analysis confirms the enormity of the unexplained disparities between SWBT's grossly inflated Missouri UNE rates and its rates in other states. *See* Lieberman Reply Decl. ¶¶ 3-4 & Exhibit 1. Indeed, SWBT's average Missouri UNE-Platform rates are higher than any Section 271 approved state in its five-state region. *See id.*

On this record, the fact that SWBT's Missouri UNE rates exceed those in Kansas and other adjoining states, even though Missouri costs are the same as, or in some cases even

[13] As explained in the reply declaration of Wauneta Browne (¶¶ 4-10), SWBT relied on several sets of discounts in connection with its Kansas/Oklahoma application, all of which should be applied to its O2A rates. SWBT's UNE rate/cost analysis, however, assumes that only some of those discounts are applied to its O2A rates. *See* Lieberman Reply Decl. ¶ 3. The result of this error is that the Oklahoma UNE rates used in SWBT's UNE rate/cost comparison are significantly overstated, thus muting the UNE rate differences between Oklahoma and Missouri. It should be noted that AT&T has received mixed signals from SWBT with regard to the discounts available under the O2A. Although SWBT's Oklahoma Area Manager of Rates and Tariffs has assured AT&T regional counsel that both the "alt reg" discounts and the additional discounts contained in SWBT's December 28 *Ex Parte* Letter can be applied to its O2A rates, Browne Decl. ¶ 6-10, SWBT's outside counsel in this proceeding has suggested that the May 4, 2001 *Ex Parte* Letter correctly represents the SWBT Missouri UNE rates that are available today – *i.e.*, a UNE purchaser can take advantage of *either* the alt reg discounts *or* the December 28 discounts, but not both.

lower than those in other states is, by itself, reason enough to deny this Application. At a minimum, the fact that SWBT's UNE rates fall well outside the range that the Commission has previously found that any reasonable application of TELRIC principles would produce obligates the Commission to "undertake independent scrutiny of the prices at issue rather than rely on the Missouri [PSC's] . . . price-setting decisions." DOJ Eval. at 2; *see also id.* at 8-10. Such independent scrutiny is also compelled by AT&T's analysis of the profit margins associated with UNE entry which, at the very least, is a strong indication that UNE prices have been set well above the range that a reasonable application of TELRIC principles would produce. *See* AT&T at 61 & n.62; Baranowski Decl. ¶ 10-24. Not surprisingly, independent review of SWBT's cost studies confirms that they violate numerous fundamental TELRIC principles. *See* DOJ at 14-19.[14]

1. SWBT's "Generic" TELRIC Errors. AT&T's initial comments demonstrated that, in a number of instances, SWBT's cost studies improperly implemented a forbidden "reproduction" approach rather than the "replacement" approach required by the Commission's TELRIC rules. *See* AT&T at 13-15; *see also* Brief of FCC, *Verizon Commun.* v. *FCC*, at 6-7, & 29, *cert. granted,* 121 S.Ct.877-89 (2001) (Nos. 00-511, 00-555, 00-587, 00-590 & 00-602) (explaining that TELRIC requires the application of a "replacement" approach, not a "reproduction" approach). That error is fatal, and the Application should be denied.

The DOJ Evaluation and other comments further demonstrate that SWBT's depreciation rates – an important determinant of all recurring UNE prices. *See* DOJ Eval. at 16-17) – are inflated by at least 12 to 15 percent. *See* WorldCom at 9. The source of these inflated

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[14] *See also* Sprint at 8-10; McLeodUSA at 28; WorldCom at 6-12.

depreciation rates can be traced to SWBT's unprincipled application of erroneous, non-TELRIC, financial accounting depreciation lives rather than proper economic depreciation lives, as required by the Commission's rules. *See* 47 C.F.R. §51.505(b)(3) ("The depreciation rates used in calculating forward-looking economic cost elements shall be economic depreciation rates").[15] As explained by DOJ, SWBT's "cost models appear to have included aggressively short asset lives, which would have resulted in high depreciation costs." DOJ Eval. at 16. And "[a]lthough the Missouri PSC modified [SWBT's] proposals, the asset lives chosen are still significantly shorter than those used (both by the Missouri PSC and other state commissions) in other proceedings." *Id.*[16]

Similarly, SWBT's common cost factors are grossly inflated, especially compared to the other states in SWBT's five state region (for which that information is available). Whereas, the Kansas Corporation Commission and the Texas Public Utilities Commission have recently adopted common cost factors of 10 percent and 13 percent respectively, SWBT's common cost factor is a whopping 16.47 percent. *See* AT&T at 18.

The record clearly shows that SWBT's excessive common cost factor is the direct result of its failure properly to apply TELRIC principles. *First,* as pointed out by DOJ (at 17-18 & n.68), SWBT's common cost factor is based almost entirely on SWBT's pre-1996 Act monopoly level of common costs and is, therefore, not reflective of the forward-looking common costs that an efficient provider would incur. *See also* AT&T at 18. *Second*, the method used by

[15] *See also* DOJ Eval. 16-17; WorldCom at 9; AT&T at 16.

[16] The depreciation lives used by SWBT are, in fact, as much as half of the depreciation lives approved by the Commission. *See* AT&T at 17

SWBT to compute its common cost factor[17] is wrong, reflecting an apples to oranges comparison. In particular, there is a fundamental mismatch between the way SWBT's 16.47% common cost is developed and the UNE costs to which the factor is being applied. SWBT calculates the common cost factor as the ratio of common expenses to total expenses (which *do not reflect return on forward-looking investment*). *See* Baranowski Reply Decl. ¶ 9. The resulting common cost factor, however, is applied to UNE costs that *do include a calculated return on the forward-looking investment*. *See id.* In other words, the denominator SWBT used to calculate its common cost factor is too small (and therefore the factor is too large) relative to the UNEs to which it is being applied. *See id.* The common cost factor should instead have been calculated as the ratio of common costs to revenues so that the common cost factor would account for rate of return on forward-looking investment as do the UNE rates to which the common cost factor is applied. *See id.* Recent analysis indicates that forward looking common costs for Missouri should be about 8%. *See* Baranowski Decl. ¶ 25.

The Missouri PSC staff and commenters also point out that SWBT's "ACES" Model, which captures SWBT's costs associated with sales taxes, telecommunications engineering and labor, miscellaneous materials, power equipment and building to house equipment, also violates TELRIC principles by capturing many of SWBT's embedded costs. *See, e.g.*, AT&T at 19. For instance, both the power factor and telecommunications engineering factors within ACES are derived from SWBT's actual experience in providing power for switches and engineering equipment replacements, which includes retrofitting and modifying embedded facilities to accommodate new equipment as well as providing for the removal and

[17] The purpose of the common cost factor is to compute the portion of expenses that are common to all UNEs and to increase UNE rates by that amount.

disposal of obsolete equipment being replaced. *See* AT&T at 19. Likewise, SWBT's ACES model reflects embedded costs for outside plant facilities such as metallic cable. *See id.* The use of these embedded costs within SWBT's ACES model violates the fundamental TELRIC principles that costs must be based on those of a forward-looking network, and not based on the existing network that reflects the high costs and inefficiencies of a regulated monopoly.

2. SWBT's Loop-Specific TELRIC Violations. The expert testimony submitted by several commenters points to numerous other significant TELRIC violations in SWBT's Missouri loop cost studies. As DOJ notes, fill factors "are a key input in the proper development of forward-looking loop costs." DOJ Eval. at 15. Here, the Missouri PSC adopted a distribution fill factor of 40 percent, a level far lower than in other SWBT states, and a level that the Commission has specifically noted was unlikely to be TELRIC-compliant. *See* DOJ Eval. at 16 (citing *Massachusetts Order* ¶ 39); WorldCom at 10; AT&T at 20-21. No distribution fill factor less than 50 percent can be justified as forward-looking, especially given that distribution fill inputs to the Commission's Synthesis Model range from 50 to 75 percent. *See* WorldCom at 10; AT&T at 20-21. And distribution fill factors in other Section 271 approved states are generally above 50 percent. *See* AT&T at 21. SWBT has made no showing that could possibly justify such low distribution fill factors. In addition, WorldCom correctly points out that SWBT's cost studies improperly assume only an 85 percent fill factor for fiber feeder. In reality, fiber feeder fill factors should be 100 percent, as the Commission's Synthesis model assumes, given that fiber cable can be "resized" simply by changing the electronics at the end of the fiber and, therefore, requires no additional fibers to accommodate future growth. *See* WorldCom at 10-11.

Other loop-related errors "include the failure to allow for tapering of feeder cable, and the allocation of all conduit costs to active, rather than dark, fiber." DOJ Eval. at 16. For example, SWBT's cost studies completely fail to account for tapering of feeder plant. *See* DOJ Eval. at 16 n.58; MCI at 12; AT&T at 22. In a forward-looking network, "a feeder segment may originate as a very large cable and taper as the cable terminates to multiple [feeder distribution interfaces.]" Staff Report at 18. SWBT's taper feeder plant "increase[s] the cost of the feeder segment because it precludes the use of large size cable at the beginning of the feeder segment and fails to recognize the tapering of the feeder cable." *See* Staff Report at 18. As noted in the DOJ evaluation, SWBT provides no reason for its failure to account for cost savings associated with tapering, noting only that it could not modify its cost model to fix this error. *See id.* at 18-19.

The concerns raised in the DOJ Evaluation regarding SWBT's treatment of dark fiber – *i.e.* allowing recovery for dark fiber in loop rates – are also confirmed by the comments. *See* DOJ Eval. at 16 & n.59; *see also* Baranowski Decl. ¶ 35. Because SWBT's Missouri loop cost model assigned all of the cost of conduit to the active fiber within it, the cost of dark fiber is effectively being recovered in loop rates. *See* Baranowski Decl. ¶ 25. The Missouri PSC Staff explained that such recovery would be inappropriate because it might allow SWBT to double recover those costs, but failed to fix the problem. *See* Staff Report at 18-19.

Aside from the TELRIC violations identified in the DOJ evaluation, the comments identify numerous other TELRIC errors in SWBT's cost studies. For instance, although SWBT's own witness concedes that integrated loop digital loop carrier ("DLC") is more efficient and less costly than non-integrated DLC, SWBT's cost studies fail to determine the ratio of integrated to non-integrated DLC's on a forward-looking basis. Instead, SWBT's cost studies assume some undocumented and arbitrary ratio – presumably based on SWBT's existing network – of integrated DLC to non-integrated DLC. *See* WorldCom at 12; AT&T at 21-22. Failure to apply forward-looking ratios of integrated to non-integrated DLC violates TELRIC, and significantly overstates SWBT's loop costs. *See id.*

Commenters also point out that SWBT's cost model departs from TELRIC by assuming an unrealistically low percentage of conduit sharing. *See, e.g.*, WorldCom at 11. Specifically, SWBT assumes a scant 0.09% of its forward-looking conduit investment will be shared with other utilities. *See* Baranowski Reply Decl. ¶ 12. SWBT apparently bases this estimate on its historical conduit sharing experience in Missouri, a methodology which is clearly inconsistent with forward-looking principles and TELRIC. *See id.* A proper forward-looking approach would, at a minimum, account for the fact that a new local telephone entrant in Missouri would seek out opportunities to share both existing and planned underground structure as a means of controlling forward-looking investments. *See id.* The Commission's Synthesis Model accounts for this fact by assuming that underground structure sharing will occur in all but the most sparsely populated areas. *See id.* Indeed, the average underground sharing rate assumed by the Synthesis Model for SWBT Missouri is nearly 40 percent. *See id.* SWBT's .09 percent conduit sharing assumption is, therefore, completely out of line with that used by the Commission's Synthesis Model.[18]

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[18] Similarly, SWBT deviates from other commonly used pole sharing ratios by assuming that it will bear 50 percent of the cost of poles in all zones. *See, e.g.*, WorldCom at 11. In reality, SWBT is likely to bear a much lower percentage of those costs. The FCC's Synthesis Model uses sharing rates as high as 65 percent, meaning that SWBT would bear only 35 percent of the cost of poles. *See id.*

3. **SWBT's Switching-Related TELRIC Violations.** The DOJ and several commenters demonstrate that the methods used by SWBT – and accepted by the Missouri PSC – to compute UNE switching costs suffer from numerous TELRIC infirmities. Most notably, the DOJ points out that SWBT's "Missouri switch cost models did not fully reflect the switch discounts that it was receiving." DOJ Eval. at 14; *See also* WorldCom at 6-7; AT&T at 23. That is, SWBT's cost models improperly compute switch discounts based on "attributable growth" rather than on "new purchases." *See id.; see also* WorldCom at 6-7; AT&T at 23. The problem with SWBT's approach is that it tends significantly to underestimate the discounts that are actually available – and that would be demanded by any efficient provider – because attributable growth discounts "are typically less than the discounts for new switches." *See* DOJ Eval. at 15 n.49 (citing Staff report at 32). Thus, the DOJ and other commenters correctly conclude that SWBT's use of attributable growth discounts instead of discounts for new switches does not "reflect[] forward-looking cost principles applied to an efficient firm." DOJ Eval. at 15; *see also* WorldCom at 6-7; AT&T at 23.[19]

Other TELRIC violations in SWBT's cost studies include SWBT's "application of the 'hardware factor,' an additive factor applied to [SWBT's] switching investment which has a 'substantial effect on switching costs.'" DOJ Eval. at 15 (citing to the Missouri PSC Staff Report); *see also* WorldCom at 8; AT&T at 24. These investment additives are substantial and likely already are included in the investments produced by SWBT's Switch Cost Information System/Model Office, thus allowing double recovery. *See* DOJ Eval. at 15; *see also* Staff Report

[19] SWBT's cost model also incorrectly applies switch discounts only to materials, and not to engineering and installation, notwithstanding the fact that the Missouri PSC Staff concedes that other firms receive discounts on those latter items. Staff Report at 32.

at 42-43; WorldCom at 8; AT&T at 24. In any event, SWBT's hardware factor appears to reflect embedded technology and not the less expensive forward-looking switch technology. *See id.*

4. SWBT's Non-recurring Charge TELRIC Violations. The DOJ Evaluation also correctly points to numerous nonrecurring charges ("NRCs") that significantly exceed those in other states. *See* DOJ Eval. at 11. For instance, the DOJ evaluation recognizes that SWBT's own price comparison charts indicate that SWBT's Missouri NRC for analog line ports is $29.53 compared to only $1.27 in Texas (that charge is not applicable in Kansas). *See id.* n.37 (citing May 4, 2001 *Ex Parte* Letter). SWBT's NRCs for dedicated transport for DS1 entrance facilities are also excessive, $471 in Missouri compared to $166 in Kansas and $74 in Texas. And dedicated transport cross-connects for additional lines cost $71.25 in Missouri compared to $60.23 in Kansas and $40.49 in Texas.[20] These disparities reflect SWBT's improper reliance on inefficient manual processes rather than the electronic processes that an efficient provider would use and that TELRIC therefore demands.

In addition, McLeodUSA (at 28-29), points out that SWBT's loop conditioning rates for Missouri are 1000 to 4000 percent higher than those in Texas (*e.g.*, SWBT charges $35.06 in Texas for the removal of load coils compared to $727.20 for the same task in Missouri). SWBT offers no justification for these huge differences in loop conditioning rates, nor could it. Efficient practices require only a few minutes of a technician's labor per line, *see id.*, and labor costs alone cannot account for these huge disparities in line conditioning charges.

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[20] Yet another example of SWBT's excessive NRC's for Missouri can be found in SWBT's Missouri Multiplexing NRCs. For voice grade to DS1, multiplexing NRCs in Missouri are $195 compared to $96.84 in Kansas and Texas.

B. SWBT Has Failed To Provide Complete, Dissaggregated And Accurate Data And Cost Models To Allow Interested Parties To Replicate And Correct SWBT's Cost Studies.

SWBT has effectively prevented commenters from calculating the almost surely enormous impact of these TELRIC violations on its UNE prices by refusing to produce the relevant electronic versions of its cost studies despite specific requests for them. *See* WorldCom at 4-6. SWBT has only belatedly provided any auditable cost studies at all, and the few spreadsheets it has now provided are woefully incomplete and hopelessly inconsistent, confirming that the obvious errors that commenters have identified are likely only the tip of the iceberg.

First, the spreadsheets and document files provided by SWBT include no underlying data to show how switching or other non-loop related costs were developed. Consequently, third parties are unable to replicate any of SWBT's non-loop cost studies or to determine the extent to which errors in those cost studies inflate SWBT's recurring UNE rates. *See* Baranowski Reply Decl. ¶ 5. For instance, SWBT's switching cost studies include investment additives for additional switch hardware that the Missouri Public Service Commission Staff criticized on the grounds that those additives are already included in SWBT's Switch Cost Information System/Model Office or elsewhere in SWBT's cost studies. *See id.* The impact of those plain errors cannot be fully assessed without access to SWBT's switching cost studies. *See id.*

Second, the spreadsheets and document files that were provided by SWBT are incomplete because they include only summaries and/or descriptions of its cost studies, and do not contain the actual data that SWBT used in its cost models. *See* Baranowski Reply Decl. ¶ 6. Notably, the spreadsheets and document files provided by SWBT do not include the sample survey of inputs that SWBT actually used in its LPVST model to compute loop costs. *See id.* Instead, SWBT provided an entirely different data set, entitled "MO 1997 Inputs.xls," that contains only summaries and averages of the outside plant used by SWBT to compute loop costs, which are not sufficient to replicate SWBT's cost studies or to measure the extent to which errors in SWBT's cost studies inflate UNE-loop rates. *See id.* For example, as AT&T explained in its initial comments, SWBT's actual sample survey replicates the inefficiencies of the embedded network by incorrectly assuming that the feeder and distribution cable sizes in place today are reflective of the forward-looking efficient cable sizes. *See* Baranowski Decl. ¶ 13. The summaries and averages provided by SWBT do not provide sufficient information to replicate SWBT's cost studies using the correct forward-looking cable sizes to determine the full impact of this error.

Third, the data sets provided by SWBT contain conflicting data, making it impossible to replicate or rely on SWBT's cost studies. For instance, there are unexplained discrepancies between SWBT's "CAPCS MO CASE TO-97-40" and "Missouri 96ACF" spreadsheets. *See* Baranowski Reply Decl. ¶ 7. SWBT claims that both spreadsheets use the Missouri Staff's inputs, yet the two spreadsheets produce conflicting outputs. *See id.* In particular, the annual depreciation rate for aerial cable computed by the CAPCS MO CASE TO-97-40 spreadsheet is almost 3 percentage points higher than that computed by the Missouri 96ACF spreadsheet. *See id.* And there is no explanation for these discrepancies contained in the documentation provided by SWBT (the "CAPCS DOCUMENTATION. DOC" file). Put simply, these files create more questions than they provide answers.

In sum, the documentation and the data actually provided by SWBT do not remotely meet its burden of showing that its recurring UNE rates for Missouri were appropriately computed. The documentation and data provided by SWBT are incomplete, overly aggregated, and internally inconsistent. For this reason as well, SWBT has failed to demonstrate that its UNE rates are cost-based. The Commission should deny the application, and should make clear that a BOC generally must include with its application electronic cost models that contain complete, dissaggregated and accurate data supporting its UNE rates, so that commenters can evaluate and rerun those models and assess the impact of any TELRIC violations.

C. SWBT'S Extensive Reliance on Interim Rates Constitutes Independent Grounds For Rejecting SWBT's Application.

Even setting aside the fact that SWBT's Missouri UNE rates violate TELRIC, its application should be denied because of its excessive reliance on interim rates. *See* DOJ Eval. at 19 ("the large number of interim rates exacerbates concerns regarding the Missouri PSC's rate-making"); *see also* McLeodUSA at 28-29; Sprint at 4-8. Indeed, about half of the rates contained in SWBT's application – far more than in any other state that has obtained section 271 approval – are interim. *See* McLeodUSA at 31. To be sure, the Commission has not automatically denied § 271 applications because they contain interim rates. Nevertheless, the Commission has tolerated reliance upon interim rates only when the state commission has otherwise demonstrated a commitment to implement permanent TELRIC-compliant prices, and where it was reasonable for the state commission to rely temporarily upon interim rates pending final disposition of a particular rate dispute. *See Kansas/Oklahoma Order* ¶ 238; *Massachusetts Order* ¶ 34.

The circumstances here are quite different from any the Commission has previously countenanced. As DOJ explains, this application presents a situation where the state has relied heavily on interim prices for scores of UNEs. Some of these interim rates have been outstanding for more than two years. Many are "troublingly high," and have been left in place notwithstanding the fact that the state PSC staff has expressed concerns that they are not TELRIC based. DOJ Eval. at 19.

This heavy reliance on interim, non-TELRIC compliant rates simply cannot be reconciled with the statutory requirement of full implementation of cost-based rates. Even the Missouri PSC's own staff concedes that the methods adopted by the Missouri PSC to compute interim UNE rates violate TELRIC. *See* McLeodUSA at 30-32 (citing MPSC Case No. TO-99-227, *Staff's Response to Southwestern Bell Telephone Company's Updated Record*, at 6 (filed Aug. 28, 2000)).

Unlike past applications, here none of the interim rates reflects an effort by the Missouri PSC to impose a temporary and reasonable solution to a particular rate dispute. *See Kansas/Oklahoma Order* ¶ 238; *Massachusetts Order* ¶ 34. At least 95 of SWBT's interim rates were simply borrowed from another state (Texas), with no review by the Missouri PSC. *See, e.g.*, McLeodUSA at 31. The remaining interim rates were implemented *over three years ago*. *See id.; see also* DOJ Eval. at 11-12 & n. 38. Since then, the Missouri PSC has allowed these rates to languish unadjusted despite their obvious adverse affects on local telephone competition in Missouri.[21] Ironically, the Missouri PSC, who has, for the past three years, failed to implement permanent rates for those UNEs, attempts to justify SWBT's use of those interim rates by noting that they are "subject to a limited true-up . . . a true-up period that is *six months*

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[21] In addition, many of these interim UNE rates are clearly excessive. For instance, SWBT's recurring UNE rates for dedicated transport for DS1 entrance facilities in Missouri ($162) are more than twice those in Kansas ($77) and Texas ($77); SWBT's recurring UNE rates for dedicated transport cross-connects are 40% higher in Missouri ($12) than in Kansas ($7.12) and Texas ($7.51); and SWBT's recurring rates for Multiplexing in Missouri ($180) are as much as twice those in Kansas ($119.03) and Texas ($81.15).

retrospectively from the date of the Commission's order." *Missouri PSC Final Order* at 35 (emphasis added). Of course, given the Missouri PSC's history regarding these interim rates, there can be no assurance that the Missouri PSC will adopt permanent rates in a reasonable time.

In sum, there are several independent reasons that compel the conclusion that SWBT has not satisfied its Checklist Item Two burden. SWBT's Missouri UNE rates were not developed using TELRIC principles, and SWBT's UNE rates fall well outside the range that any reasonable application of TELRIC principles would produce.

II. THE COMMENTS SUPPORT AT&T'S CONTENTION THAT SWBT HAS FAILED TO COMPLY WITH THE REQUIREMENTS OF SECTION 251(c) AND THE RECENT *ASCENT* DECISION WITH RESPECT TO THE PROVISION OF ADVANCED SERVICES.

DOJ correctly "recognize[s] that there are serious concerns pertaining to SBC's resale of advanced services, namely, whether SBC is offering DSL services to end users without making those services available for resale at a wholesale discount." DOJ Eval. at 20; *see also id.* at 2, 21. As AT&T has previously shown, SWBT is marketing DSL Transport in Missouri as a retailer directly to residential and business end-users without making those services available for resale at a discount that reflects the avoided cost of all of its marketing, customer care, and other retailing efforts. As a result, SWBT has failed to comply with its obligations under the checklist and under the *ASCENT* decision of the U.S. Court of Appeals for the District of Columbia Circuit.[22]

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[22] *See* AT&T at 32-38 & Finney Decl. ¶¶ 7-22; *Association of Communications Enterprises v. FCC*, 235 F.3d 662, 668 (D.C. Cir. 2001) ("*ASCENT*"); *KS/OK 271 Order* ¶ 252 n.768 (stating that Commission "expect[s] SWBT to act promptly to come into compliance with section 251(c)(4) in accordance with the terms of the [*ASCENT*] decision").

Obviously in reaction to AT&T's evidence, SWBT recently altered its Missouri web-site to delete, from its retail list of residential products and services, its prior listing of "DSL Transport only," which invited the residential end-user to "Order *just the DSL feature* and use your current Internet Service Provider (ISP) or an ISP from our ISP Partners program." *See* Finney Decl. ¶ 12 & Att. 1, p. 3; Attachment 1 hereto at 3 (emphasis added).[23] The revised SWBT web-site now purports to offer DSL to residential customers only as part of a "package" of DSL transport and Internet access. *See* Attachment 1 hereto at 1, 3. This deletion is nothing more than a belated, and transparent, attempt by SWBT to avoid the mandate of the *Second Advanced Services Order* that a BOC offer for resale at a wholesale discount any advanced services that it offers at retail directly to residential and business end-users.[24]

Despite the deletion of the explicit offering of a "DSL Transport only" option, SWBT's revised web-page makes clear that SWBT continues to hold itself out as a provider of DSL Transport in Missouri to residential customers. As before, SWBT's web-page offers DSL to residential customers as part of a "package of DSL transport and Internet access," and states that SWBT's DSL Transport "is provided by" ASI. *See* Attachment 1 hereto at 1, 5. And, as before, the web-page states that in lieu of purchasing a combined DSL/Internet package from SWBT's advanced services affiliate, a residential customer "may choose one of our ISP partners whose service you can subscribe to in order to connect to the Internet." *Id.* at 4. SWBT

[23] The explicit retail offering of "DSL Transport only" was set forth on SWBT's Missouri web-page as recently as April 23, 2001 – the day before AT&T filed its comments on SWBT's application and the last day AT&T checked the cite prior to filing those comments. *See* Finney Decl. ¶ 12 n.9.

[24] *See Second Advanced Services Order* ¶ 3 ("advanced services sold at retail by incumbent LECs to residential and business end-users are subject to the same section 251(c)(4) discounted resale obligation, without regard to their classification as telephone exchange service or exchange access service").

describes the "ISP Partners" program ("Internet Access Services Program") as a program through which independent ISPs and network integrators "act as authorized DSL sales representatives for Southwestern Bell DSL transport services."[25]

In addition, the web-page of one of SWBT's "ISP Partners," Brick Network, continues to confirm that SWBT makes DSL transport available as a stand-alone service directly to residential end-users. According to Brick's web-page, any DSL customer would receive separate bills from SWBT for DSL and from Brick for ISP charges.[26]

Finally, SWBT's web-page for Missouri continues to list "DSL Transport only" as a retail service available to *business* customers. *See* Attachment 4 hereto at 3. Under the *Second Advanced Services Order*, SWBT must – at a minimum – make that service available for resale at the wholesale discount. Even more significantly, however, the fact that SWBT continues to list "DSL Transport only" as a retail service available to business end-users provides further evidence that its deletion of that service from its "residential" web-page is a sham. In its recent financial report on 1st quarter 2001 results, SWBT's parent, SBC, stated that it "views DSL as a key growth platform for the future – capable of delivering a host of entertainment, information and time management services as well as high-speed Internet access to *both*

[25] *See* Attachment 2 hereto at 1; Finney Decl. ¶ 12 n.11 & Att. 2.

[26] *See* Attachment 3 hereto. AT&T had previously confirmed, through phone conversations with Brick Network and by consulting Brick's website, that a DSL customer would receive a bill from Brick Network for ISP charges and a separate bill from SWBT for DSL charges. Finney Decl. ¶ 13 & attached Garroway Decl. ¶ 7. The attached Brick web-page (located at www.brick.net), which is virtually unchanged from the Brick web-page submitted with AT&T's opening comments, was obtained by using the link for Brick on SWBT's web page entitled "Internet Access Services Program," which lists independent ISPs and network integrators who are SWBT's "ISP Partners." Finney Decl. ¶ 12 & n.11.

residential and business customers."[27] Given SBC's plainly stated objective of providing DSL to both residential and business customers, it is obvious that SWBT's deletion of "DSL Transport only" as a residential retail offering from its web-page is simply a poorly designed attempt by SWBT to conceal its failure to meet its resale obligations.

Thus, SWBT's clumsy attempt to erase all references to "DSL Transport only" from its list of retail offerings to residential customers on its web-page cannot mask the fact that it offers DSL Transport as a stand-alone service at retail to residential and business end-users – and therefore is obligated to offer such services for resale at a wholesale discount to *both* classes of customers. SBC's latest reports on its financial performance make clear that its ILECs – including SWBT – mass-market DSL Transport services at retail. According to SBC's press release on its 1st Quarter 2001 results, SBC had 954,000 "DSL subscribers" by the end of March 2001 – an increase of 187,000 "new DSL customers" from the preceding quarter.[28] This is not the report of the modest wholesaler of DSL service to ISPs that SWBT portrays in its Application. Because SWBT has made no showing that it makes these services available for resale at a wholesale discount, it cannot show that it has met the requirements of the checklist.[29]

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[27] *See* SBC Investor Briefing, "Strong Growth in Data, Wireless and Long Distance Highlights SBC's First-Quarter Results," dated April 23, 2001 (Attachment 5 hereto), at 4 ("SBC Investor Briefing") (emphasis added).

[28] *See* "Growth Drivers Highlight SBC's First-Quarter Earnings," SBC press release dated April 23, 2001, p. 2 (Attachment 6 hereto); SBC Investor Briefing at 4 (Attachment 5 hereto); AT&T at 34-35 & Finney Decl. ¶ 14..

[29] Any contention by SWBT at this stage that it recently ended its "DSL Transport only" retail offering should be rejected by the Commission. To begin with, any such contention is belied by SWBT's own revised web-page and by the web-page of one of its own "ISP partners," as described above. Even assuming *arguendo* that SWBT recently terminated its offering, that event occurred after the filing of comments on April 24 – and, therefore, evidence of such termination would be improper under the Commission's complete-when-filed rule. *See* fn. 24,